APPENDIX I

02-55143

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CLIFTON WAYNE MAXWELL,

Petitioner-Appellant,

v.

ERNIE ROE, WARDEN,

Respondent-Appellee.

TO THE HONORABLE BETTY FLETCHER, PROCTOR HUG KIMBERLY WARDLAW, CIRCUIT JUDGES:

Warden Roe requests rehearing and suggests rehearing en banc of the July 2, 2004, opinion of this Court. The slip opinion that reversed the denial of Maxwell's Petition for Writ of Habeas Corpus, and remanded to the District Court for a "full evidentiary hearing," is contained at Appendix A. Fed. R. App. P. 35, 40.

INTRODUCTION

The key issue in this case is this: When a state court conducts a full hearing on a defendant's competency to stand trial, considers all relevant evidence presented to it, and finds the defendant competent, does 28 U.S.C. § 2254(e)(2) permit a federal court to hold an evidentiary hearing to conduct a "more

complete inquiry" based upon documents the defendant presented for the first time in the federal appeal?

This question raises three issues of exceptional importance. Fed. R. App. P. 35(a)(2). First, it demonstrates that there is a void in this Court's jurisprudence regarding how to evaluate state court competency determinations under AEDPA. Compare Amaya-Ruiz v. Stewart, 121 F.3d 486 (9th Cir. 1997) (the pre-AEPDA case relied on by the District Court where the state court conducted a full competency hearing), and Torres v. Prunty, 223 F.3d 1103 (9th Cir. 2000) (the post AEDPA case relied on by the panel decision where the state court did not conduct a competency hearing). Second, the question raises the issue of when it is appropriate to conduct a federal evidentiary hearing to perform "a more complete inquiry" on a defendant's competency based on evidence never presented to the state court; and equally important, whether the panel's decision conflicts with the United States Supreme Court's recent decision in Holland v. Jackson , 124 S. Ct. 2736, 2004 U.S. LEXIS 4758 (No. 03-1200 June 28, 2004). Third, by considering documents presented by Maxwell for the first time on appeal, the question asks whether a petitioner should be permitted to disregard established rules of appellate procedure and the rules of the Ninth Circuit governing the submission of "excerpts of record." Fed. R. App. P. 35(b)(1)(B).

Because federal courts are routinely called upon to review competency determinations made by state courts, the questions raised in this case, concerning the rules governing the standards employed by federal courts in determining whether a state court competency hearing was adequate under Pate v. Robinson, 383 U.S. 375 (1966), raises questions of exceptional importance.

SUMMARY OF RELEVANT FACTS

Essential to the understanding of these important issues are the "rather complex facts underlying the competence issue" (ER D at 5) as resolved in the state trial court:

In 1995, Clifton Maxwell and three co-defendants were charged with murder. 1 CT 169. In May 1996, under Cal. Penal Code § 1368[1] defense counsel requested a hearing to determine Maxwell's competency to stand trial. Three psychologists and one psychiatrist evaluated Maxwell and found him to be competent; three of the experts found Maxwell to be a malingerer. SER 212.[2] On December 16, 1996, counsel informed the court that Maxwell wished to submit the competency question on the reports and represented that he had "discussed this with Mr. Maxwell" who agreed with the decision. The trial court asked Maxwell, who was not being disruptive, if he agreed. Maxwell said he did. Based on the reports, the trial court found Maxwell competent to stand trial and reinstated criminal proceedings. 12/16/96 RT at 2, 5-6.

Maxwell subsequently appeared at several continuance hearings and was not disruptive. 1 CT 262. In January 1997, counsel asked for additional time to prepare for trial, stating that he and Maxwell were "still working on the case and still in the process of preparing for it." 1 CT 266, 268. The trial court asked Maxwell if he wished to waive time and he did. 1 CT 276. Thereafter, Maxwell was present for several additional

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1. Competency proceedings initiated under Cal. Penal Code §§ 1367 and 1368 employ the standards set forth in Pate v. Robinson, 383 U.S. 375 (1966). *See* People v. Pennington, 66 Cal. 2d 508, 516, 517, 426 P.2d 942, 947-948 (1967).

2. Throughout this petition, Warden Roe refers to Appellee's Supplemental Excerpts of Record as "SER."

continuance hearings; at no time did he act strangely or disrupt the court proceedings. 1 CT 280, 286, 288, 291; 2 CT 304.

On January 6, 1998, the judge assigned to preside over Maxwell's trial reviewed the psychological reports, found no change in circumstances, and found Maxwell to be competent. SER 212-213. On various subsequent dates in January, defense counsel informed the court that he was concerned about Maxwell's ability to stand trial because he was deteriorating, was housed in the jail's psychiatric unit, and was not communicating with counsel. A sheriff's deputy also informed the court that Maxwell was the subject of numerous evaluations under Cal. Welf. & Inst. Code § 5150 and that he was refusing his antipsychotic medication. ER D at 5; ER E at 4. The court concluded, however, that Maxwell was malingering and trying to feign a psychotic mental state, and did not suspend proceedings. ER D at 6; ER E at 4.

On January 13, 1998, defense counsel informed the court that Maxwell was on suicide watch and would not cooperate to allow counsel to prepare an opening statement. Counsel indicated he had spoken with Maxwell the previous Friday at which time he felt Maxwell "would be difficult again and probably would not change his attitude." SER 242-43. Maxwell did want to come to court and asked his attorney to move for substitute counsel. SER 243. Counsel stated that when he last spoke to Maxwell, Maxwell said he did not want to come to court and if he did he would be disruptive. SER 245. Counsel stated Maxwell might never want to come to court and that he believed it was in everyone's best interest not to try and forcibly bring Maxwell to court because he could put "a lot of people in danger." SER 245.

The court announced that Maxwell had been found in possession of a razor blade and transferred to the hospital for a 72-hour evaluation under Cal. Welf.& Inst. Code § 5150. The court still found Maxwell was malingering and feigning mental

illness so he would not have to go to trial. ER D at 5-6; ER E at 4; SER 245-50. The court found Maxwell elected not to cooperate even though he had the capacity to do so, saying, "He may feel that he is generating appellate issues which might present a better defense than an actual defense at trial to the factual charges." SER 248. Thereafter, counsel told the court that Maxwell asked him to tell the court that he did not want to come to court, that he wanted the court to review the "1368" reports, to point out to the court that he had a history of psychiatric problems, that he wanted the court to know he was on medication in jail, and that he had received threatening letters from a co-defendant, who was also a witness. SER 248-49. The court then found Maxwell had voluntarily absented himself from trial and, after defense counsel declined to express a doubt as to Maxwell's competency, stated it did not have a doubt as to Maxwell's competency. SER 250-51.

The next day, counsel indicated that Maxwell had told him he was not willing to come to court, and that he would not behave and conform his behavior to that required in the courtroom. SER 253.

The following day two psychiatrists certified Maxwell for a 14 day hold at the hospital under Cal. Welf. and Inst. Code section 5150. SER 255. Upon learning this the court again found that Maxwell was malingering:

> [S]o we have a very clear record, I do not want this record to suggest or reflect that this Court is proceeding against Mr. Maxwell when he is actually incompetent. [¶] I feel based upon the information that I have on Mr. Maxwell that he is malingering and feigning this situation to put himself in a psychiatric light which indicates his lack of competency to proceed. [¶] I think that is feigned.

SER 256-57.

Out of an abundance of caution, however, the court ordered Maxwell's doctor to provide a summary of his impressions of Maxwell "so we can have a clear record." SER 257.

The next day, Maxwell appeared in court. The court stated that for the past week, Maxwell had been housed at the hospital security ward for his own benefit and safety. The court had a one-page faxed note from Maxwell's doctor indicating Maxwell had been cleared to come to court for the past week. When the court asked Maxwell if he wanted to be present during trial, defense counsel stated that Maxwell told him he did not want to be present for trial. SER 260-61. The court again stated it had no doubt that Maxwell was competent to stand trial. Therefore, it had not moved for an additional evaluation under 1368. Defense counsel informed the court that he had "continual contact with Mr. Maxwell during the course of the trial, visiting him at the county jail in Riverside General Hospital." When asked by the court if he was making a 1368 motion, counsel said no, and said that he had no doubt about Maxwell's competency.[3] SER 262.

When the court again invited Maxwell to remain for trial, Maxwell stated he was not going to sit and "let these people lie on me." SER 262. The court observed that Maxwell was quietly sitting during the proceeding and asked counsel if he wanted Maxwell to remain for trial. Counsel thought Maxwell would be disruptive and should not be present for trial. SER 263-64.

After the jury convicted Maxwell of first degree murder, at sentencing the trial court stated:

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3. Maxwell has never alleged that defense counsel was ineffective.

> And during the course of this case, Mr. Maxwell has been removed from the court several different times for his behavior, and it's very clear to me that this individual is competent and was competent to stand trial. ¶ And he was feigning a mental disease or disorder to, number one, disrupt the proceedings, and, two, to attempt in some fashion to convince this Court that because of his mental problem, he was incompetent to stand trial and it's clear to me that has been totally feigned and fabricated.

Sentencing RT at 20.

III.

WHEN A STATE COURT CONDUCTS A FULL HEARING INTO A DEFENDANT'S COMPETENCY, CONSIDERS ALL RELEVANT EVIDENCE PRESENTED IN STATE COURT, AND FINDS THE DEFENDANT COMPETENT, 28 U.S.C. § 2254(E)(2) DOES NOT PERMIT A FEDERAL COURT TO HOLD AN EVIDENTIARY HEARING TO CONDUCT A "MORE COMPLETE INQUIRY" BASED UPON DOCUMENTS NEVER PRESENTED TO THE STATE COURT

The decision of the California Court of Appeal reviewed the trial court's factual finding of Maxwell's competency under Pate v. Robinson, and held that the trial court properly found Maxwell competent. The District Court applied the presumption of correctness set forth in 28 U.S.C. § 2254(e)(2) to the findings of the trial court, and found that the Court of Appeal did not unreasonably apply United States Supreme Court precedent. In so doing it relied on Amaya-Ruiz a pre-

AEDPA case that denied an evidentiary hearing on more egregious facts than in this case.

The panel decision, however, ignored the requirements of AEDPA; did not apply the presumption of correctness to any of the numerous factual findings made by the trial court, and ignored the fact that Maxwell's new evidence had never been presented in state court. The panel decision ordered the District Court to hold a "full evidentiary hearing" to determine what a "more complete inquiry" by the trial court would have revealed regarding Maxwell's competency, and relied on Torres v. Prunty, a post-AEDPA case in which the trial court held no competency hearing, whatsoever.

Two things are apparent. First, Torres v. Prunty is not persuasive authority for ordering an evidentiary hearing in this case because, there, the state court conducted no competency hearing and made no factual findings. Second, if Torres v. Prunty can be read to apply to post-AEDPA cases in which a trial court did hold a competency hearing, it obviously conflicts with the Supreme Court's recent holding in Holland v. Jackson. These points are discussed below.

A. By Relying On Torres v. Prunty, The Decision Overlooks The Requirements For An Evidentiary Hearing And Impermissibly Orders An Evidentiary Hearing to Conduct A "More Complete Inquiry" To Consider Documents Never Presented In State Court

To support its decision to remand for an evidentiary hearing to consider "both the facts established in the record and the facts 'a more complete inquiry' by the trial court could have revealed," the decision in this case relied on Torres v. Prunty. (Slip. Opn. at 2-3.) In Torres, a post-AEDPA case in which the more rigorous standards for an evidentiary hearing were applicable, this Court held that the trial court's refusal to hold

a competency hearing constituted an inadequate fact finding process. Torres, 223 F.3d at 1105-08. The state trial court never questioned the defendant, never suspended proceedings to have Torres evaluated, and failed to credit defense counsel's expressed doubt as to Torres's competency. Id. at 1109.

By contrast, in this case two judges, the first in a formal competency hearing, the second in reviewing, without objection from defense counsel, the same information considered by the first judge, considered numerous psychological reports and found Maxwell competent. The trial judge then remained alert each day for any changes in Maxwell's mental state. Further, defense counsel continually expressed no doubt as to Maxwell's competency and the court repeatedly found that Maxwell was malingering. The trial court made numerous factual findings that must be afforded the presumption of correctness under 28 U.S.C. § 2254(e)(1).

The decision by the panel attempts to distinguish Amaya-Ruiz v. Stewart, from the present case. Yet, in Amaya-Ruiz, a pre-AEDPA case in which the more liberal evidentiary hearing requirements applied, the trial court held two competency hearings prior to trial and determined the defendant was competent to stand trial. Amaya Ruiz, 121 F.3d at 488. In determining the trial court was not required to have held another competency hearing, Amaya-Ruiz held that it could examine only the information that was before the state trial court when it made its competency determinations. Id. at 489. The Court could not consider evidence which was not presented until state post-conviction proceedings to determine if the trial court should have ordered further evaluations of the defendant. Id. at 493. Instead, based on counsel's doubt as to the defendant's competency and two pre-trial evaluations indicating the defendant was a malingerer, Amaya-Ruiz held that the trial court's "explicit finding that Amaya-Ruiz was intentionally

attempting to hinder the proceedings with his disruptive conduct" was a "factual finding . . . entitled to a presumption of correctness." Id. at 490-92.

It is difficult to see how the state court's decision in this case warrants a different result than Amaya-Ruiz. Indeed, if these more-egregious facts did not entitle Amaya-Ruiz to an evidentiary hearing governing the requirements for an evidentiary hearing prior to the passage of the AEDPA (id. at 488 n.1), it is impossible to see how the facts in this case justify an evidentiary hearing under post-AEDPA law. After all, two judges found Maxwell competent, including the trial judge who continually made certain the record did not show the court was proceeding against Maxwell while he was incompetent, defense counsel expressed no doubt, and there were numerous findings of malingering.

Thus, rehearing en banc is necessary to fill the void between this Court's decision in Amaya-Ruiz and Torres, and clarify how AEDPA's presumption of correctness and requirements for an evidentiary hearing apply to state-court competency proceedings.

B. Under the AEDPA's Mandated Evidentiary Hearing Requirements And the Presumption of Correctness To Be Afforded A State Trial Court's Competency Determinations, A Federal Court Cannot Order An Evidentiary Hearing To Perform A "More Complete Inquiry" Based On Evidence Never Presented To The State Court

The well-settled law regarding federal habeas review at competency hearings casts grave doubt on the efficacy of the panel decision, and its insistence that Torres controlled this case.

A federal court may not overturn a state trial court's competency determinations "unless it concludes that they are not 'fairly supported by the record." Demosthenes v. Baal, 495 U.S. 731, 735 (1990) citing Maggio v. Fulford, 462 U.S. 111, 117 (1983); Davis v. Woodford, 333 F.3d 982, 997 (9th Cir. 2003). Accordingly, a state court's factual finding as to a defendant's competence is binding on a federal habeas court. Demosthenes, 495 U.S. at 735.

In reviewing whether a state trial court should have sua sponte conducted a competency hearing, a federal court "may only consider the evidence that was before the trial judge." Davis, at 997; Williams v. Woodford, 306 F.3d 665, 704 (9th Cir. 2002); United States v. Lewis, 991 F.3d 524, 527 (9th Cir. 1993).

When a federal appeals court has not personally observed the defendant, as the state court did, it has "even less reason to overturn what is essentially a factual determination." Demosthenes, 495 U.S. at 737; see also Williams v. Woodford, 306 F.3d at 706 citing Medina v. California, 505 U.S. 437, 450 (1992)("defense counsel will often have the best informed view of the defendant's ability to participate in his defense"); Torres v. Prunty, 223 F.3d at 1109 ("defense counsel was in the best position to evaluate Torres's competence and ability to render assistance"); Hernandez v. Ylst, 930 F.2d 714, 718 (9th Cir. 1991) (fact that defense counsel considered the defendant competent to stand trial was significant evidence that the defendant was competent).

Under 28 U.S.C. § 2254(e)(2), a district court presented with a request for an evidentiary hearing as to a particular claim must first determine whether the factual basis to support the claim was developed in the state court. Williams v. Taylor, 529 U.S. 420, 432 (2000); Gandarela v. Johnson, 286 F.3d 1080, 1087 (9th Cir. 2001). A petitioner is barred from obtaining an evidentiary hearing under the AEDPA when he does not

exercise diligence in developing the facts in the relevant state court proceedings and has not shown, by clear and convincing evidence, that no reasonable fact finder would have found the petitioner guilty of the underlying crime but for the alleged constitutional error. Gandarela, 286 F.3d at 1087; Griffin v. Johnson, 350 F.3d 956, 966 (9th Cir. 2003); Wildman v. Johnson, 261 F.3d 832, 839 (9th Cir. 2001). The petitioner must establish what additional, material facts he expects an evidentiary hearing will reveal. Gandarela, 286 F.3d at 1087.

The United States Supreme Court's recent decision in Holland v. Jackson, 124 S. Ct. 2736, 2004 U.S. LEXIS 4658 (No. 03-1200 June 28, 2004), reaffirms these principles under AEDPA. In Holland, the Supreme Court granted certiorari and reversed and remanded the granting of a habeas petition holding in part, that the Sixth Circuit failed to make the required finding that the petitioner had been diligent in pursuing newly discovered evidence in support of his claim that trial counsel was ineffective under Strickland v. Washington, 466 U.S. 668 (1984). 2004 U.S. LEXIS 4658 at *4-6. The evidence could have been the subject of an evidentiary hearing in the District Court, but only if the inmate was "not at fault in failing to develop that evidence in state court, or (if he was at fault) if the conditions prescribed by section 2254(e)(2) were met." Id. at *5. Where a district court makes no finding that an inmate has been diligent in pursing the evidence or that the limitations set forth in section 2254(e)(2) were met, and a court of appeals does not independently inquire into these matters, but simply ignores entirely the state court's independent ground for its decision, that evidence is not properly before the federal court. Id. at *6; see also Thatsaphone v. Weber, 137 F.3d 1041, 1045-46 (11th Cir. 1998) (district court "went beyond its habeas authority" when it held an evidentiary hearing "'to develop the factual record'" where petitioner did not show cause for failing to develop factual record in state court).

Maxwell never attempted to meet this standard, nor did the panel decision find that Maxwell met the requirements for an evidentiary hearing in the District Court. In fact, Maxwell never asked the District Court for an evidentiary hearing. (SER at 1-45.) Yet on appeal, he filed numerous "excerpts" with this Court that were never presented to the District Court, and, more troubling, that were never presented to the state court. See Excerpts G, H, I, J, K, L, M, & N; Maxwell's Supplemental Excepts B, E. Thus, by ordering an evidentiary hearing to perform a "more complete inquiry," the panel decision impliedly considered Maxwell's inappropriate excerpts and ignored the presumption of correctness to be afforded the trial court's factual findings. Affording Maxwell an evidentiary hearing on evidence never presented to the state trial court contravenes the Supreme Court's decision in Holland, as well as the dictates of 28 U.S.C. § 2254(e)(2).

C. The Panel Decision Completely Disregards Established Rules of Appellate Practice And The Rules of the Ninth Circuit

The Rules of the Ninth Circuit require appellate litigants to file "excerpts of record" and delineate what shall be included in the excerpts. These rules are designed to prevent litigants from altering the record on appeal from that made in the lower courts. See Ninth Cir. R. 10-2(a) & (b), 30-1.1(a), 30-1.1(a)(xi), 30-2(a)-(d).

In support of his appeal, Maxwell filed excerpts of record never presented to the District Court, many of which were never considered by the trial court in determining Maxwell's competency. Despite never presenting them to the District Court or the state trial court, Maxwell filed in this Court Excerpts K ("Haldol (Haloperidol) as Described in the Physician's Desk Reference"), L ("Mr. Maxwell's Mental Health Records 1) Special Education Records 2) Military Discharge for Mental Unfitness 3) Social Security Disability

Payments" and additional military records added to Excerpt L by counsel on appeal on January 6, 2003), and N ("Declaration of [sic] by Dr. Bruce Hubbard, Psycho-pharmacologist), and Supplemental Excerpts B (a doctor's note dated January 21, 1998), and E (Hospital Medication Records). Although Warden Roe requested the panel strike the inappropriate excerpts, there is no indication in its decision that the Court ruled on Warden Roe's requests to strike and disregard these inappropriate excerpts.[4]

Litigants who do not provide excerpts of record that truly are "excerpts" of the "record," impair this Court's ability to perform its appellate function. Lowry v. Barnhart, 329 F.3d 1019, 1024-25 (9th Cir. 2003); see also Dela Rosa v. Scottsdale Memorial Health Systems, Inc., 136 F.3d 124, 1244 (9th Cir. 1998).

Despite repeated warnings by this Court, Maxwell has flagrantly disregarded the rules of this Court. By failing to

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4. Similarly, Warden Roe notes that the decision fails to address Maxwell's claim that he was involuntary medicated during trial. (Request to Broaden Certification of Issues on Appeal at 4-16), and Warden Roe's assertion that Maxwell was procedurally barred from raising the issue and that there was no evidence lodged in the District Court and considered by the state trial courts that demonstrated Maxwell was forcibly administered any anti-psychotic drugs. (Appellee's Supplemental Brief at 1-29). As such, the decision overlooks material facts, namely Maxwell's submission of still more inappropriate excerpts of record, and has failed to rule on the claim advanced by Maxwell which the California Court of Appeals and the District Court found was procedurally barred. Warden Roe respectfully requests a panel rehearing to resolve the issue and rule on the procedural bar issue. Fed. R. App. P. 35.

strike Maxwell's inappropriate excerpts, it is unclear whether the decision in this case rests solely upon the evidence presented to the District Court and the state trial court. By neglecting to strike the excerpts, the decision in this case suggests to habeas petitioners that if they ignore established appellate procedures and skew an appellate record by inserting documents never considered by lower courts, an appellate court will not be able to distinguish between the true record and that created by an appellate litigant solely to aid in his appeal. En banc review is proper to ensure that such a dangerous precedent is not allowed to strike at the very heart of the appellate processes of this Court. Fed. R. App. P. 35(a)(2).

CONCLUSION

For these reasons, Respondent-Appellee, Warden Ernie Roe, respectfully requests this Court grant a panel rehearing and a rehearing en banc.

Dated: July 27, 2004

Respectfully submitted,

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